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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

IN RE PLAID INC. PRIVACY
 LITIGATION

THIS DOCUMENT RELATES TO:
 ALL ACTIONS

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**OPPOSITION TO PLAID'S REQUEST
 FOR JUDICIAL NOTICE**

Hon. Donna M. Ryu

Action Filed: May 4, 2020

Trial Date: None Set

The Court should deny Plaid’s request for judicial notice in support of its motion to dismiss. Dkt. 81. Plaid attempts to introduce a set of irrelevant, factually disputed, incomplete, and improperly authenticated exhibits to defeat Plaintiffs’ adequately stated claims. “[U]nscrupulous use of extrinsic documents [by defendants] to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). If anything, Plaid’s extrinsic documents show the need for discovery rather than a premature dismissal.

I. ARGUMENT

Plaid’s request for judicial notice fails because no exception allows Plaid to escape the general rule that a court should not consider extrinsic documents at the pleading stage.

A. Legal Standard: Only Two Narrow Exceptions Allow Consideration of Extrinsic Documents at the Pleading Stage

When ruling on a motion to dismiss, a court generally may not consider “any material beyond the pleadings.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (quotation omitted). There are two exceptions: judicial notice under Federal Rule of Evidence 201 and the incorporation-by-reference doctrine. *Khoja*, 899 F.3d at 998. Plaid argues that both exceptions apply here.

Judicial notice applies to a limited set of adjudicative facts that are “not subject to reasonable dispute” because they are “generally known” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(1)–(2). An “*undisputed* matter of public record” may be judicially noticed; “*disputed* facts stated in public records” cannot. *Lee*, 250 F.3d at 690 (emphasis in original).

The second exception, incorporation by reference, is a “judicially created doctrine that treats certain documents as though they are part of the complaint itself.” *Khoja*, 899 F.3d at 1002. This doctrine, however, is narrow. It applies only to documents that a plaintiff refers to “extensively” in the complaint or those that “form[] the basis of” a claim. *Id.* at 1002. Further, a court may only incorporate documents “whose authenticity no party questions.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002); *see also Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (listing as a

1 requirement for incorporation by reference that “no party questions the authenticity of the copy attached
2 to the 12(b)(6) motion.”). In addition, there must be “no disputed issues as to the document’s relevance.”
3 *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

4 With respect to both exceptions, the Ninth Circuit has recently cautioned against their “overuse
5 and improper application.” *Khoja*, 899 F.3d at 999. “If defendants are permitted to present their own
6 version of the facts at the pleading stage—and district courts accept those facts as uncontroverted and
7 true—it becomes near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently
8 ‘plausible’ claim for relief.” *Id.* (citations omitted).

9 **B. The Court Need Not Analyze the Two Exceptions Here Because Plaid’s Extrinsic**
10 **Documents Are Irrelevant to the Court’s Inquiry**

11 As explained in more detail below, Plaid has failed to show that either incorporation by reference
12 or judicial notice applies. But Plaid’s request fails for another reason: the documents it seeks to include
13 are irrelevant to its motion to dismiss. *See e.g., Fairbairn v. Fid. Investments Charitable Gift Fund*, No.
14 18-04881, 2018 WL 6199684, at *4 (N.D. Cal. Nov. 28, 2018) (declining to take judicial notice of
15 NASDAQ trading volumes because “Plaintiffs dispute the relevance of the document to the complaint
16 allegations and what inferences can be drawn from it.”).

17 Plaid attempts to use these documents—Plaid’s own privacy policy, three others from
18 Participating Apps, and a set of Venmo screenshots—to argue that Plaintiffs consented to Plaid’s
19 privacy intrusions and other misconduct. Although that argument roundly disregards the detailed
20 allegations in the Complaint, these documents also date from well **after** Plaid first accessed Plaintiffs’
21 information. *Compare* Exs. A–D to Dettmer Decl. to CAC ¶¶ 100, 111, 121, 130, 140, 150, 159, 168,
22 178, 188, 199.

23 Indeed, it is clear that Plaid’s outside counsel accessed and printed the privacy policies months
24 after Plaintiffs **filed the Complaint**. *See, e.g.,* Ex. A to Dettmer Decl. at 1 (showing a print date of
25 September 12, 2020 in the upper left-hand corner). Plaid’s screenshots of a single app’s enrollment
26 process similarly date from August 2020. *See id.*, Ex. E. Rather than systematically compile and
27 authenticate the privacy policies and enrollment screens in effect during the relevant time period—a
28

fact-intensive inquiry ill-suited for a motion to dismiss—Plaid submits only the most recent versions that its outside counsel could find on the web.

In light of the discretion given to courts to consider extrinsic documents at all, *see, e.g., Khoja*, 899 F.3d at 998 (“Both of these procedures *permit* district courts to consider materials outside a complaint [but they do not require it].”) (emphasis added), the Court should deny Plaid’s request to notice or incorporate the irrelevant set of documents submitted here.

C. Plaid Has Not Met the Requirements for Judicial Notice

As previously stated, Plaid’s outside materials consist of privacy policies downloaded from the web in September 2020 (Exhibits A through D) and a set of application screenshots taken by outside counsel in August 2020 (Exhibit E). None of these documents are properly subject to judicial notice.

First, privately maintained websites and applications do not qualify as “sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2).¹ “[A] document is not judicially noticeable simply because it appears on a publicly available website, regardless of who maintains the website or the purpose of the document.” *Resolute Forest Prods., Inc. v. Greenpeace Int’l*, 17-02824, 2019 WL 281370, at *1 (N.D. Cal. Jan. 22, 2019) (quoting *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025, 1032 (N.D. Cal. 2018)). That is so because webpages are “changed, modified, and revised over time.” *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1168 (S.D. Cal. 2010).

Assuming that post-Complaint privacy policies are relevant at all, the accuracy concerns raised by submitting screenshots of dynamic webpages make key facts about them subject to reasonable dispute. When these particular policies came into effect and whether Plaintiffs had the opportunity to view them are not resolved by Plaid’s documents without dispute. Thus, they are ineligible for judicial notice. *See id.* (refusing to judicially notice screenshots of online policies because whether plaintiffs viewed them was subject to reasonable dispute); *see also Moorer v. Stemgenex Med. Group, Inc.*, No. 16-02816, 2017 WL 1281882, at *4 (S.D. Cal. Apr. 6, 2017) (refusing to judicially notice screenshots of

¹ Plaid does not argue that the existence and contents of these documents are “generally known within the trial court’s territorial jurisdiction.” Fed. R. Evid. 201(b)(1). Plaintiffs therefore focus on the second prong of Rule 201.

1 webpages because “the ever-changing content” made the pages’ accuracy incapable of “ready
2 determination”).

3 That is equally true of the app screenshots in Exhibit E. Phone apps are updated on a regular
4 basis. Apps vary by phone operating system (*e.g.*, iOS versus Android). Plaid offers no version history
5 or other contextual information that would allow the Court to readily determine accuracy.

6 **Second**, even if ever-changing websites and applications could be considered accurate sources,
7 Plaid has not shown the accuracy of these particular websites and applications through proper
8 authentication. The supporting declarant is Plaid’s former outside counsel for this lawsuit.
9 Notwithstanding a conclusory statement to the contrary, his declaration includes no facts to support
10 personal knowledge of even Plaid’s own privacy policy, such as how the policy has been implemented,
11 revised, and published (not to mention how one could determine who accessed it, when). Moreover,
12 Plaid’s outside counsel omits all but a recent version of that policy even though that version references
13 prior ones.

14 The declarant’s lack of personal knowledge is even clearer for the documents within the control
15 of Participating Apps (Exhibits B through E). *See, e.g., In re Easysaver Rewards Litig.*, 737 F. Supp. at
16 1167 n.4 (doubting whether an employee of one company “has the personal knowledge to authenticate
17 webpages controlled by” a different company). There too he submits only a recent version. In short,
18 without proper authentication, the accuracy of Plaid’s sources is open to reasonable dispute, and judicial
19 notice of these documents is not appropriate.

20 **Third**, Plaid improperly seeks to use judicial notice to establish purported “facts” that are subject
21 to dispute. Whether any version of Plaid’s privacy policy was disclosed to Plaintiffs, and (if so), whether
22 that version of the policy, or any other disclosure, would inform a reasonable consumer of Plaid’s
23 conduct, are factual questions that cannot be resolved in Plaid’s favor with reference to Exhibits A
24 through E alone. They are ineligible for judicial notice for this reason as well. *Khoja*, 899 F.3d at 1000
25 (holding that it is improper to judicially notice a document when the substance “is subject to varying
26 interpretations, and there is a reasonable dispute as to what [it] establishes”) (citation omitted).

1 **D. Plaid Has Not Met the Requirements for Incorporation by Reference**

2 The argument that the Complaint incorporated Plaid’s outside materials by reference also fails.
3 **First**, the Complaint does not refer to the documents that Plaid included in its request. Nor could it. The
4 Complaint centers on privacy violations that arose well before the effective date of the policies and app
5 registration process captured in Plaid’s screenshots.

6 Although Plaintiffs referred to Plaid’s privacy policy and provided some paradigmatic
7 screenshots of a Participating App’s registration process, they did not refer or otherwise rely on the
8 policy in Exhibit A or the registration process in Exhibit E, both of which plainly post-date the
9 Complaint. Relatedly, even if reference to a prior version were sufficient to introduce later versions (and
10 leave out all others), incorporation by reference is not permitted if there are “disputed issues as to [a]
11 document’s relevance.” *Coto Settlement*, 593 F.3d at 1038. Plaintiffs dispute the relevance of each of
12 Plaid’s extrinsic documents.

13 The privacy policies of Participating Apps are particularly unsuitable for incorporation by
14 reference: Plaintiffs never mention them at all. And even if there had been a passing reference or an
15 inference that such policies exist, that would not allow their wholesale incorporation. *See id.* (“[T]he
16 mere mention of the existence of a document is insufficient to incorporate the contents of a document.”).
17 Indeed, Plaid attempts to use these policies as a defense, not because they form the basis for any of
18 Plaintiffs’ claims. This Plaid cannot do. *See Khoja*, 899 F.3d at 1003 (“Submitting documents not
19 mentioned in the complaint to create a defense is nothing more than another way of disputing the factual
20 allegations in the complaint.”).

21 **Second**, Plaid seeks to employ the doctrine of incorporation by reference for an impermissible
22 purpose. Even if Exhibits A through E formed the basis of the Complaint (which they do not), it would
23 be improper to assume the truth of these documents in order to conclude, as Plaid requests, that
24 Plaintiffs’ expectation of privacy was unreasonable and/or that Plaintiffs consented to Plaid’s alleged
25 conduct here. *Khoja*, 899 F.3d at 1003 (noting that consistent with the prohibition against resolving
26 factual disputes on the pleadings, “it is improper to assume the truth of an incorporated document if such
27 assumptions only serve to dispute facts stated in a well-pleaded complaint”).
28

1 **Third**, the authenticity of Plaid’s documents is in question. Although courts may incorporate
 2 documents extensively referenced in the pleadings, that is true only if “their authenticity has not been
 3 questioned.” *Olivera v. Am. Home Mortg. Servicing, Inc.*, 689 F. Supp. 2d 1218, 1222–23 (N.D. Cal.
 4 2010) (quoting *No. 84 Employer–Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*,
 5 320 F.3d 920, 925 n. 2 (9th Cir.2003)), *disagreed with on other grounds by Beaver v. Tarsadia Hotels*,
 6 816 F.3d 1170 (9th Cir. 2016).

7 Here, Plaintiffs reasonably dispute authenticity. As mentioned previously, Plaid attempts to
 8 authenticate its extrinsic documents with a declaration from Plaid’s prior outside litigation counsel, Mr.
 9 Dettmer. But an attorney’s “conclusory recitation does not satisfy the requirements of F.R.E. 602 that
 10 evidence be introduced sufficient to support a finding that [he] has personal knowledge.” *Garcia v.*
 11 *Fannie Mae*, 794 F. Supp. 2d 1155, 1161–62 (D. Or. 2011) (citations and quotation marks omitted).
 12 “Under most circumstances, an attorney has no personal knowledge of and is not competent to testify to
 13 the authenticity of documents generated before the litigation began or merely produced by his client.”
 14 *Blount v. Connecticut Gen. Life Ins. Co.*, No. 01-1341, 2002 WL 31974405, at *3 (D. Or. July 2, 2002).
 15 Mr. Dettmer’s supporting declaration does not reveal any unusual circumstances that would supply the
 16 requisite personal knowledge.

17 For the documents to be relevant at all, Plaid would need to, among other things, lay a
 18 foundation for asserting that these are the policies and application screens viewed or effective prior to
 19 the filing of the Complaint. Mr. Dettmer’s declaration is devoid of any such details, and it is improbable
 20 that he could provide them absent speculation or hearsay. An attorney “cannot acquire personal
 21 knowledge based on hearsay from his client” or otherwise. *Blount*, 2002 WL 31974405, at *3 (citing
 22 *United States v. Dibble*, 429 F.2d 598, 602 (9th Cir.1970)). Mr. Dettmer’s inability to acquire the
 23 requisite knowledge without improper reliance on speculation or hearsay is particularly evident for the
 24 policies and screenshots from Participating Apps—all but one of Plaid’s documents. He does not
 25 represent them and appears to have simply visited their websites. The Court should deny Plaid’s request
 26 to incorporate its improperly authenticated extrinsic documents. *See, e.g., Olivera*, 689 F. Supp. 2d at
 27 1223 (declining to incorporate signed notices because the plaintiffs took exception to their authenticity).
 28

1 **II. CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that the Court deny Plaid's request to
 3 judicially notice Exhibits A through E and refuse to consider the accompanying declaration from Mr.
 4 Dettmer.

5 Dated: November 17, 2020

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